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**Committee on the Judiciary**
**United States House of Representatives**
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# Saving the Savings Clause: Congressional Intent, the Trinko Case and the Role of the Antitrust Laws in Preserving Competition in the Telecom Sector

Mr. Chairman, Ranking Member Conyers, and distinguished members of the Committee:

I am pleased to have the opportunity to present the views of the Association for Local Telecommunications Services ("ALTS") and the CompTel/ASCENT Alliance regarding the importance of the continued application of the antitrust laws to activities that may also be subject to regulation under the Telecommunications Act of 1996. Collectively, these two trade associations represent virtually the entire competitive telecommunications industry. My primary goals here today are to impress upon the Committee the absolutely critical role that the antitrust laws play in creating and sustaining competition in telecommunications markets, and to explain why the Department of Justice's position in the *Trinko* case threatens that competition.

I am a partner in the law firm of Bingham McCutchen, where I co-Chair the firm's Antitrust and Trade Regulation group. I have practiced antitrust law for over 18 years, and have particular experience litigating antitrust claims that arise in the telecommunications industry. In addition, I am the Chair of the Communications Industry Committee of the American Bar Association's Section on Antitrust. The views contained in this testimony are in no way officially endorsed by or reflect those of the American Bar Association.

ALTS is the leading national industry association to promote local telecommunications competition. ALTS represents facilities-based providers, called Competitive Local Exchange Carriers ("CLECs"), that build, own, and operate competitive local networks. ALTS' mission is to promote facilities-based competition. ALTS member companies deploy circuit and packet switches, DSLAMs, fixed wireless antennas, fiber optic trunks, and other facilities in direct competition with the Baby Bells. Like all competitors, ALTS companies must purchase from the monopoly phone companies parts of the ubiquitous local telephone network to connect customers to competitive facilities. To this end, ALTS believes nondiscriminatory access to all local monopoly transmission facilities must be afforded CLECs so that consumers are allowed to enjoy the benefits and advantages that come with competition.

The CompTel/ASCENT Alliance was formed in November 2003 by the merger of the two leading trade associations in the competitive telecommunications industry, the Competitive Telecommunications Association (CompTel), founded in 1981, and the Association of Communications Enterprises (ASCENT)(combined as "CompTel/ASCENT"). With 400 members, CompTel/ASCENT is the largest and oldest association representing comptetitive facilities-based carriers, providers using unbundled network elements, global integrated communications companies, and their supplier partners. CompTel/ASCENT, which is based in Washington, D.C., includes companies of all sizes and profiles that provide voice, data and video services in the U.S. and around the world. Despite a wide variety of business models, CompTel/ASCENT members share a common objective: To create and sustain true competition in the telecommunications industry.

**Executive Summary**

The debate over access to the monopoly-controlled local telephone network is nothing new. For almost as long as there been a telephone network, there has been the question of the extent to which competitors should be provided access to the nonduplicable portion of the network. Given that the local phone network was built on the backs of ratepayers and supported by government-mandated guaranteed rates of return, both regulation and the antitrust laws have always been the instruments for providing competitive access to the network. This has been the case through the three phases of telecommunications antitrust history: the single regulated monopoly, AT&T; the break-up of AT&T; and the injection of competition into the telecom market by the 1996 Act.

Competition in the telecom market in the last 7 years is plainly evident. The Consumer Federation of America estimates that consumers are already saving up to $5 billion annually. Investment in infrastructure continues with ALTS estimating investments over $76 billion in next generation telecom networks. The Phoenix Center also has found that local competition has boosted wireline telecom employment 17% above historical trends, adding 92,000 wireline jobs. CompTel estimates that if local phone competition laws are preserved nationwide, consumers could save an additional $9 billion. In addition, innovation is best evidenced by the introduction and other facilities-based competitors of innovative broadband solutions, such as the integrated access product that offers small and medium-sized businesses voice and data over the same loop at remarkably lower prices than the Bell Company price. Similarly, this innovation is demonstrated by the availability of residential DSL service, which sat on the Bell monopolies' shelves until competitors brought the product to market after the 1996 Act.

The benefits of competition are not because of the strong enforcement of competition and antitrust laws, but in many respects in spite of them. The Bells have not been willing partners in the development of competition. Examples of Bell efforts to erect barriers to competition are too numerous to name but include sluggish responsiveness to requests for access to Bell lines, lost work orders, excessive charges to co-locate facilities, efforts to legislatively raise wholesale rates to keep competitors out of markets, and proposals to change the pricing formula for determining fair wholesale rates despite the support of the present formula - TELRIC - by Congress, the FCC and the Supreme Court. This is to say nothing of the Bells' efforts in the courts to extinguish the applicability of the antitrust laws to them, a move made more serious by recent reports about theBells' secret meetings to extinguish competition laws.

I recognize the principal purpose of this hearing is not to delve into the serious concerns raised by the U.S. Telecom Association's secret dinner meeting in Washington and the memorandum accompanying the exclusive dinner describing its efforts –with the help of SBC, Verizon, and BellSouth -- to arm twist the Bells' suppliers into rebating or giving a kick back of their revenues to launch a $40 million campaign to end competition. However, this meeting puts in the starkest terms the monopolistic mindset of the Bell companies and the lengths to which they will go to maintain their dominant power in the telecom market. I fully concur with Ranking Member Conyers' statement that this meeting may well constitute impermissible activity and raises some troubling issues concerning the exertion of collective pressure over the manufacturers.

The threat looming to competition in the telecom sector is real given the trinity of weak regulatory enforcement, antitrust laws whose applicability is mired in litigation, and the recent Triennial Review Order that single handedly deregulated the broadband market. First, with regard to regulatory enforcement, the Bells themselves recognize fines as merely the cost of doing business and FCC Chairman Powell has concurred that the FCC's current enforcement authority "is insufficient to punish and deter violations." Second, the Triennial Review Order, despite concerns by a majority of FCC Commissioners, determined that requirements for the Bells to provide competitors with access to linesharing (the means by which competitors bring broadband into homes and businesses) would be phased out. The FCC also eliminated a competitor's access to any hybrid last mile facility that has an ATM or packet-based technology, further pushing CLECs out of the small and medium sized business market. Finally, if the Supreme Court finds in *Trinko* that the antitrust laws do not apply to the telecom industry, we will then be returned to a wholly unregulated telephone monopoly unchecked by enforcement powers, regulation, or the antitrust laws.

Such an outcome would have been unheard of in 1996 when Congress clearly intended for the antitrust laws to apply to the telecom industry. The Act is unambiguous in two savings clauses, the first of which states: "nothing in this Act or the amendments made by this Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." The Act also expressly confirms that "[t]his Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State or local laws unless expressly so provided in such Act or amendments."

Though three Federal Circuits have rejected Verizon's claim that somehow the savings clauses only mean that antitrust laws apply when there is predatory pricing, we face the possibility that the Supreme Court will find in Verizon's favor and severely limit the applicability of the antitrust laws. Particularly disturbing is the Justice Department's about face in support of Verizon's position.

As the competitive industry has argued to the Supreme Court, a ruling in Verizon's favor would be inconsistent with antitrust precedent. The antitrust case law, in both regulated and unregulated industries, demonstrates that no monopolist may engage in the exclusionary conduct the Bells have practiced in the last 7 years. Predatory pricing need not be shown to demonstrate an antitrust violation. In the first instance, the Bells' ownership of the telephone network is the quintessential example of an essential facility, which under decades of antirust rulings the Bells can be required to share with its rivals if the Bells try to leverage it for monopoly power over another market such as broadband. Additionally, monopoly conduct that forces competitors to raise their costs in an effort to destroy competition also would violate the antitrust laws. Neither of these cases require a showing of predatory pricing.

Given the Judiciary Committee's tireless role in overseeing the antitrust laws, and in particular, its efforts in 1996 to ensure that the antitrust laws continued to apply to the telecom industry, this hearing in and of itself should be an important and clear signal to the Justice Department that antitrust enforcement must be available to complement regulatory enforcement of the industry. Perhaps more importantly, it may require this Committee's leadership again to enact legislation – perhaps merely underlining the 1996 Act's savings clauses and adding two exclamation points – to serve notice and make clear that telecom consumers deserve the protection of both regulatory and antitrust enforcement.

## I. Antitrust Laws Are Essential to Telecommunications Competition

This debate over access to the facilities ILECs control is not new. Local telephone monopolists have long been using their control over the nonduplicable local network – a network that literally connects by wire all end users in a given geographic region – to exclude competition in other markets that depend on access to that monopolized local network. And long before the 1996 Act, courts applied well-established antitrust principles to make sure competitive providers could obtain such access. Just as the antitrust laws first paved the way for open competition in the long distance telecommunications markets, the antitrust laws remain a necessary tool for overall telecommunications competition to remain and grow.

### A. Background: Antitrust Law in the Telecom Sector

In general, the development of telecommunications antitrust law can be viewed in three phases: (1) the single regulated monopoly, AT&T; (2) the antitrust break-up of AT&T into a long-distance company and the Regional Bell Operating Company ("RBOC") local monopolies; and (3) the introduction of competition to local telephone markets by the 1996 Act. It is important to remember that regulation, such as that entailed by the 1996 Act, has been a constant in the telecom sector, through all these phases. Despite that regulation, the antitrust laws have always applied to the industry, just as they should today.

In the first phase, the telephone system was almost entirely controlled by a single monopoly (AT&T), which was regulated, but not subject to meaningful competition. The Communications Act of 1934 ("1934 Act") combined with various state legislation to provide an intricate structure of regulation. *See Jarvis, Inc. v. AT&T*, 481 F. Supp. 120, 122 (D.D.C. 1978). Even under this regulatory regime, AT&T had a duty to permit competing carriers, like MCI, to interconnect with its local exchange network. *See MCI Comms. Corp. v. AT&T*, 708 F.2d 1081, 1134-36 (7th Cir. 1983), *citing MCI Telecomms. Corp. v. FCC*, 561 F.2d 365 (D.C. Cir. 1977), cert. denied, 434 U.S. 1040 (1978). Local telephone monopolists have long been required to provide competitors full access to their local networks, including to their local loops, through a process called interconnection. *See In the Matter of Establishment of Policies and Procedures for Consideration of Application to Provide Specialized Common Carrier Services in the Domestic Public Point-to-Point Microwave Radio Service and Proposed Amendments to Parts 21, 43, and 61 of the Commission's Rules*, 29 F.C.C.2d 870, 940, ¶ 157 (1971) ("Specialized

Common Carrier"). The FCC regulated that interconnection duty and AT&T was famously found to have violated the antitrust laws for failing to comply with it –including for its failure to lease local loops to competitors, a core part of the RBOCs' current anticompetitive strategy. AT&T's failure to allow competitors like MCI to interconnect, despite that duty, spawned numerous antitrust actions. The federal courts uniformly held that the 1934 Act and the detailed FCC orders and regulations implementing it did not exempt AT&T from antitrust liability.

The second phase of modern telecommunication law resulted from the United States' antitrust suit against AT&T, alleging it had used its local network monopoly to stifle competition in other, related markets, like long distance, that depended on access to the local network. *See United States v. AT&T*, 552 F. Supp. 131, 139 (D.D.C. 1982), aff'd sub nom., *Maryland v. United States*, 460 U.S. 1001 (1983). The lawsuit resulted in the 1983 "Modified Final Judgment" ("MFJ"), which prevented such unlawful leveraging by establishing separate companies (the RBOCs) to take ownership of the local networks in their respective regions. *See id.*, at 227. From the MFJ until Congress passed the 1996 Act, the RBOCs continued to operate as protected monopolies with guaranteed rates of return over virtually all local telephone service. *See AT&T v. Iowa Utilities Bd*., 525 U.S. 366, 371 (1999).

In the third phase, post-1996 Act, Congress "ended the longstanding regime of state-sanctioned monopolies," *id*., and established a '"pro-competitive, deregulatory national policy framework' for telecommunications, opening all telecommunications markets to competition so as to make advanced telecommunications and information technologies and services available to all Americans." First Report and Order and Further Notice of Proposed Rulemaking: *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, FCC 99-48, No. 98-147, 1999 WL 176601, at 13, (Mar. 31, 1999) (*citing* 47 U.S.C. § 251). The 1996 Act requires RBOCs to make the local networks they control available to CLECs, on "just, reasonable and nondiscriminatory" terms pursuant to "interconnection agreements." 47 U.S.C. § 251(c)(3), (c)(6).

After the 1996 Act, competition in local telecommunications markets began to grow. New competitors sprang up and began to offer entirely new services to consumers, particularly broadband DSL. Investment in infrastructure occurred - and continues to occur – at a rapid clip. For instance, ALTS reports that new entrants in the local market have invested over $76 billion in next-generation telecommunications networks since the Act was passed.[1] Even more, new competitors have been successful in bringing lower prices to consumers in the traditional monopoly market of local phone service. The Consumer Federation of America estimates that local phone customers across the country are saving up to $5 billion annually, thanks entirely to competition.[2] CompTel estimates that if competition is preserved nationwide, consumers can save an additional $9 billion. And, most importantly, millions of Americans now, for the first time, have a choice for their local telecommunications provider.

This success can be attributed to a bedrock principle of antitrust law that Congress recognized and sought to implement through regulations set forth pursuant to the 1996 Act. That is, in order to promote competition in a monopoly market, and in order to move quickly to a fully

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[1] *Available at* http://www.alts.org/Filings/2003AnnualReport.pdf
[2] *Available at* http://www.consumerfed.org/unep_200310.pdf

functioning free market, access to the essential facilities of the telephone network must be made available to new entrants. This core principal, perhaps more than any other, provides the foundation upon which local competition is built. Congress mandated that access to the essential facilities of the phone network be achieved through "unbundling." The FCC determines which parts of the network must be unbundled and shared with competitors.

Despite the clear goals of the 1996 Act, the RBOCs did not freely open their networks to CLEC competitors. In fact, they did the exact opposite. They threw up every operational, legal, and regulatory hurdle they could find to prevent competition from developing the local markets. Knowing that delay was in their favor, the RBOCs used the court system to tie up competitive policy created by the regulators. During the wait for the courts to act, they snubbed the implementation of regulatory orders, using delay tactics to enable them to "wait competitors out of the market." As a result, the RBOCs delayed competitive entry for nearly seven years. Such a process cannot be what Congress had in mind when it passed the 1996 Act.

**B. The Looming Threat**

It is no exaggeration to say that the very future of local telecom competition hangs in the balance as the committee considers the matters before it today. The goals of Congress to create a competitive local telecom marketplace are in severe jeopardy. We do not propose that the RBOCs' exclusionary conduct represents the only challenge facing CLECs. Nor do we propose that Congress should protect CLECs from the ordinary workings of the competitive marketplace. But it would be inexcusable if the RBOCs were permitted to eviscerate local competition because they convinced the courts that Congress did not intend them to continue to be bound by the antitrust laws.

The 1996 Act did not create a regulatory enforcement mechanism to ensure that monopolies actually complied with the obligations of their interconnection agreements. Instead, Congress did two things: (1) it retained the enforcement remedies that existed under the 1934 Act; and (2) it made clear that it intended the antitrust laws to remain a vibrant enforcement tool to prevent local telephone monopolists from abusing their retained monopoly power.

First of all, regulatory enforcement of the unbundling requirements of the Act has been, to say the least, weak. The FCC acknowledges this. FCC Chairman Michael Powell told Congress that "[g]iven the vast resources of many of the nation's ILECs," the FCC's current fining authority of $1.2 million per offense "is insufficient to punish and deter violations in many instances." Letter from Chairman Powell to House and Senate Appropriations Committees of 5/4/01. In fact, the FCC did not take a single step to enforce any unbundling requirement until this year.

Secondly, the Bell companies were granted vast deregulation with regards to broadband services by the FCC in the recently completed *Triennial Review*. In particular, the FCC eliminated CLEC access to hybrid lines (part copper and part fiber) that use packet-based technology. This relief granted to the Bells violates the statute and is arbitrary and capricious for several reasons. First, the FCC decision to grant relief based on the deployment of a particular technology violates the statute's mandate that its rules be nondiscriminatory and technology neutral. Second, the FCC's reliance upon Section 706 as justification for granting such relief is blatantly inconsistent with the plain language of Section 706 itself which requires the FCC to promote both local competition and investment in broadband. Moreover, with Bell efforts to extend such relief into the small and medium sized enterprise (SME) market, where there is no alternative provider, essentially relegates the small businesses of America to a deregulated Bell monopoly. In reaching such a conclusion, the FCC failed to account for the differences between small business customers and others that demand similar type services. Moreover, the decision is unreasonable because the FCC ignored the D.C. Circuit's mandate that unbundling relief be subject to a granular analysis of the marketplace.

The FCC also eliminated an unbundling requirement called line sharing. Line sharing enabled competitors to compete with the Bells for residential DSL services. As line sharing is phased out, it will become increasingly difficult for any competitor to offer local broadband services to customers, pushing the residential market, like the small business market, away from a competitive market and back towards an unregulated monopoly market.

This result is even more troubling when one considers that the antitrust laws have not been vigorously applied in the local market since the 7th Circuit's decision in the *Goldwasser* case. *Goldwasser* was the first case to ignore the savings clause, and started the ball rolling to where we are today. The ever-opportunistic Bell companies seized on *Goldwasser* to seek immunity from the antitrust laws. Inexplicably, the DOJ followed suit and also seeks to insulate the local monopolies from antitrust scrutiny.

Given the inability of the FCC to enforce the laws, given the vast deregulation granted to the Bell companies just a few months ago, and given the Department's incredible about-face as to their reading of the savings clause, it is no stretch to say the local telecommunications market is dangerously close to becoming an unregulated monopoly. This result is alien to the pro-competitive spirit of the Act, and must be averted.

## II. *Trinko* and the Savings Clause Conundrum

The 1996 Act does not supplant or change the antitrust laws. It states so unambiguously through both a savings clause directed specifically at antitrust enforcement and an additional general savings clause:

> SAVINGS CLAUSE . . . nothing in this Act or the amendments made by this Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.
>
> NO IMPLIED EFFECT This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State or local laws unless expressly so provided in such Act or amendments.

1996 Act, Pub. Law No. 104-104, 110 Stat. 143, §§ 601(b)(1), (c)(1) (1996) (reprint at 47 U.S.C. § 152 note) (hereinafter cited as "1996 Act, § 601"). Though the RBOCs for a time argued that the 1996 Act created a form of quasi-immunity, now CLECs, RBOCs and the government all nominally agree that Congress intended for antitrust remedies to apply in full force to anticompetitive conduct whether or not subject to the 1996 Act.

While this should really be the end of the discussion, it is only the beginning. Presented with the quandary of resolving the inconsistency between their call for immunity under the 1996 Act and the unambiguous savings language, the RBOCs – and later the Department of Justice – came up with the perfect solution for making an end run around the savings clauses. The RBOCs now take the position that antitrust remedies apply, but that their refusal to grant access to the networks they control would never qualify as exclusionary under established antitrust principles. In effect, they seek the creation of a new rule that essentially imposes a predatory pricing requirement before a monopolist may be found to have engaged in an actionable refusal to deal. That proposed amendment to the Sherman Act is both unfounded and ill-advised.

The new rule the RBOCs and the government now propose is 1) inconsistent with well-established antitrust principles (as the Supreme Court put it in *Kodak*, what the RBOCs seek here would be "a radical departure in this Court's antitrust law," 504 U.S. at 479-80 n.29), 2) inconsistent with the position previously asserted by the FCC and the DOJ in antitrust cases involving the 1996 Act, and 3) inconsistent with the government's own pre-1996 Act antitrust enforcement actions. For these reasons the Second, Ninth and Eleventh Circuits have rejected the position Verizon and the government now assert in the *Trinko* case now pending before the Supreme Court. Should the Supreme Court agree with that position, the savings clauses in the 1996 Act would be rendered meaningless and CLECs will find it all the more difficult to offer consumers competitive telecommunications products in what, in effect, will be deregulated monopoly markets.

### A. Inconsistency with Antitrust Precedents

Many decades of antitrust law, in both regulated and unregulated industries, make clear that no monopolist may engage in the type of exclusionary conduct the RBOCs have practiced so relentlessly for the past seven years. The claims against Verizon in *Trinko*, for example, are nothing new. Rather, they arise from the same conduct – abuse of the unique monopoly power inherent in the local telephone network – that led to the breakup of the old AT&T Bell System twenty years ago. Nonetheless, the RBOCs, DOJ, and FTC argue that courts should analyze claims against RBOCs using the same "sort of analysis [employed] with respect to predatory pricing." US/FTC Brief 16. That would be a massive change to, not an application of, the antitrust laws. It is true the courts "have recognized that conduct is exclusionary where it involves a sacrifice of short-term profits or goodwill that makes sense only insofar as it helps the defendant maintain or obtain monopoly power." *Id.* But that is not the only form of conduct that qualifies as exclusionary. Rather, Section 2 jurisprudence recognizes that "the means of illicit exclusion, like the means of legitimate competition, are myriad." *Id.*, 14 (quoting *Microsoft*, 253 F.3d at 58).

That is why courts analyzing claims of exclusionary conduct have focused not on attempts to establish a list of practices that are (or are not) exclusionary, but have analyzed instead the "anticompetitive effect" of the challenged conduct. *Microsoft*, 253 F.3d at 58. Thus, conduct is exclusionary if it "harms the competitive process." *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 21 (1st Cir. 1990) (Breyer, J.). In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), the Supreme Court recognized the broad and flexible nature of exclusionary conduct: "If a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory." 472 U.S. at 605 (*quoting* R.

Bork, *The Antitrust Paradox*, 138 (1960)). *Aspen* went on to quote the Areeda and Turner definition of exclusionary conduct: "behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." *Id.* at 605 n.32, (*quoting* P. Areeda & D. Turner, 3 Antitrust Law 626b, 78 (1978)). While the fact pattern in *Aspen* certainly met that test, the Court has never – in *Aspen*, *Kodak* or elsewhere – pronounced that only forsaking profits would do so. Indeed, the Seventh Circuit has interpreted *Aspen* to mean "a monopolist may be guilty of monopolization if it refuses to cooperate with a competitor in circumstances where some cooperation is indispensable to effective competition." *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 379 (7th Cir.) (Posner, J.) *rehearing denied*, 802 F.2d 217 (1986), *cert. denied*, 480 U.S. 934 (1987). That is precisely what Trinko and CLECs have alleged. The ILECs refuse to deal with CLECs with the specific knowledge that their refusal makes it impossible to compete.

### 1. The Courts Have Not Applied a Predatory Pricing Requirement

Antitrust precedents do not support the assertion that competitors must make a showing akin to predatory pricing before they may proceed with a refusal to deal claim. The claim ignores the history of antitrust enforcement in the telecom sector and, in doing so, ignores the savings clauses in the 1996 Act.

Although there has been much implied criticism of the label of essential facilities, the concept itself is surprisingly well-accepted. The concept is hardly controversial in principle: when a vertically integrated monopolist controls a facility that cannot practicably be duplicated, and which is essential to competition in some other markets, the monopolist may not use its control over that facility to gain a monopoly over those other markets. While the Supreme Court has never formally adopted the doctrine as such, it is in fact derived from a Supreme Court decision. *United States v. Terminal R.R. Ass'n of St. Louis*, 224 U.S. 383 (1912). And every Circuit Court of Appeal has adopted the doctrine, and all agree as to its elements. *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978); *Interface Group, Inc. v. Massachusetts Port Auth.*, 816 F.2d 9, 12 (1st Cir. 1987); *Delaware & Hudson Ry. Co. v. Consol. Rail Corp.*, 902 F.2d 174, 179 (2d Cir. 1990), *cert. denied*, 500 U.S. 928 (1991); *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 748 (3d Cir. 1996); *Advanced Health-Care Servs. v. Radford Cmty. Hosp.*, 910 F.2d 139, 150 (4th Cir. 1990); *Mid-Texas Communications Sys., Inc. v. AT&T Co.*, 615 F.2d 1372, 1387 n.12 (5th Cir. 1980); *Directory Sales Mgt. Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 612 (6th Cir. 1987); *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1132-33 (7th Cir. 1983); *City of Malden v. Union Elec. Co.*, 887 F.2d 157, 160 (8th Cir. 1989); *Vernon v. Southern California Edison Co.*, 955 F.2d 1361, 1366-67 (9th Cir. 1992), *cert. denied*, 506 U.S. 908 (1992); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1520 (10th Cir. 1984), *aff'd on other grounds*, 472 U.S. 585 (1985); *Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272, 1285-88 (11th Cir. 2002); *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1356-57 (Fed. Cir. 1999).

The concept of essential facilities is consistent with decades of antitrust rulings by the Supreme Court, which have routinely denounced efforts by monopolists to extend their monopolies from one market into another. *Kodak*, 504 U.S. at 479-80 n.29 (Supreme Court "has held many times that power gained through some natural and legal consequence such as a patent, copyright, or business acumen can give rise to liability if 'a seller exploits his dominant position in one market to expand his empire into the next.'"); *Leitch Mfg. Co. v. Barber Co.*, 302 U.S. 458, 463 (1938) (attempted extension of monopoly from one market into another is illegal "whatever the nature of the device" used to do so).

There can be no doubt that the local telephone network is a paradigm example of an essential facility. The networks the RBOCs control were built up – with no risk, a rate of return guaranteed by ratepayers – over many decades, and simply cannot be duplicated. Even the government recognizes that a telecom antitrust case, MCI's struggle against AT&T, is the "leading case" dealing with the essential facilities doctrine. Here is how the government described the ruling in *MCI*: "a monopolist may be required to assist rivals by sharing a facility if the monopolist can 'extend monopoly power from one stage of production to another.'" (Brief For The United States And The Federal Trade Commission As Amici Curiae, No. 02-682 ("*Trinko* Amicus Brief") at 12)

### 2. Other Conduct , Such As Raising Rivals' Costs, Is Exclusionary

The RBOCs' proposed test is obviously flawed because it exempts from liability any anticompetitive conduct that does not involve the sacrifice of profits. Among other things, it thus immunizes the well-recognized propensity of monopolists to destroy competition without ever foregoing a cent of profit, by raising their rivals' costs. *See generally* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Cost to Achieve Power Over Price*, 96 Yale L.J. 209, 224 (1986) ("Raising rivals' costs can be a particularly effective method of anticompetitive exclusion. This strategy need not entail sacrificing one's own profits in the short run . . . ."); *see also* Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 Colum. Bus. L. Rev. 257, 318-23 (2001) (discussing economic logic behind raising rivals' cost theory). Raising rivals' costs has been a primary mechanism by which RBOCs have destroyed competition.

Where a monopolist, like the RBOCs, controls inputs that are necessary to competition in other markets, it can thwart that competition by raising its rivals' costs of obtaining them. That may happen directly, as with the type of price squeeze condemned in the landmark *Alcoa* case, *United States v. Aluminum Co. of America*. 148 F.2d 416, 437-38 (2d Cir. 1945); *see also* Steven C. Salop, *Economic Concepts and Antitrust Analysis*, 56 Antitrust L.J. 57, 58-59 (1987) (evil of price squeeze is not predatory pricing; "rather, it is a claim that firms exclude rivals and gain power over price by raising their rivals' costs"). Monopolists have also found more subtle means to inflate their competitors' costs. *See, e.g.*, *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1339-40 (7th Cir. 1986) ("When a firm finds a way to confront its rivals with higher costs, it may raise its own prices to consumers without drawing increased output from them."); *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1478 (9th Cir. 1997), aff'd, 525 U.S. 299 (1999) (reversed summary judgment; policy raised factual question of whether conduct raised competitor's costs); *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Professional Publications, Inc.*, 63 F.3d 1540, 1553 n.12 (10th Cir. 1995) (raising rival's costs "would qualify as anticompetitive conduct unless [defendants] could demonstrate a legitimate business justification for it").

RBOCs have perpetrated both types of raising-rivals'-costs schemes – especially against facilities-based CLECs. The RBOCs have engaged in direct price squeezes, and routinely employ countless mechanisms, including stall and delay tactics, to make the interconnection process as time-consuming and costly as possible, all with no purpose but to extend their monopoly over the local telephone network into monopoly power over downstream markets such as the market for Internet access.

That is the state of antitrust protection that the savings clauses were meant to preserve. The attempt by the RBOCs and the government to eliminate those protections, and to challenge RBOCs only when they engage in the equivalent of predatory pricing, makes the savings clauses a nullity.

### B. Inconsistency with Prior Interpretations of the 1996 Act

The position the government takes in *Trinko* also appears to be a radical and unexplained departure from the Government's prior position concerning CLEC antitrust claims against RBOCs. Until *Trinko*, the government did not mention or apply any special standard applicable to refusal-to-deal claims by competitors in this context. Indeed, the government opined to several federal courts of appeals that claims brought by CLECs almost identical to those brought by the Trinko plaintiffs stated antitrust claims.

#### 1. Early FCC Position Recognized Need for Antitrust Enforcement

In implementing sections 251 and 252 of the 1996 Act (governing the arbitration for and approval of interconnection agreements between ILECs and CLECs), the FCC formally acknowledged that its regulations did not provide the "exclusive remedy" for anticompetitive conduct. First Report and Order, *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, FCC 96-325, 1999 WL 452885, 11 FCC Rcd 15499 (Aug. 8, 1996), ¶ 124. The FCC emphasized that, in addition to judicial review of arbitrations setting the terms of interconnection agreements, "parties have several options for seeking relief if they believe that a carrier has violated the standards under section 251 or 252," *id*., expressly including private antitrust enforcement: "we clarify . . . that nothing in sections 251 and 252 or our implementing regulations is intended to limit the ability of persons to seek relief under the antitrust laws." *Id*., at ¶ 129.

The FCC has also observed that even minor delays in providing interconnection to local telephone networks "can represent a serious and damaging business impediment to competitive market entrants" including facilities-based CLECs and AT&T, the CLEC serving Trinko. Second Report and Order, *In the Matter of Implementation of the Telecommunications Act of 1996*, 13 F.C.C.R. 17,018, ¶ 3 (July 14, 1998). FCC and state administrative agencies simply do not have the power to deter such conduct, nor to compensate its victims. Antitrust remedies, including treble damages and attorneys' fees, are necessary to make the ILECs, with their vast resources, obey the law.

#### 2. 2001: DOJ and FCC Support CLEC Antitrust Claims

In an *amicus curiae* brief submitted to the Eleventh Circuit in *Intermedia Comms., Inc. v. BellSouth Telecomms., Inc*., No. 01-10224-JJ (11th Cir., filed Mar. 28, 2001), a case in which

BellSouth raised similar issues as Verizon raises in *Trinko*, the DOJ and the FCC expressly supported a finding that Intermedia had stated an antitrust claim by alleging violations of Section 251 of the 1996 Act. The DOJ and FCC opined to the Court of Appeals for the Eleventh Circuit in 2001 that a CLEC's allegations of an ILEC's "failure to provide reasonable interconnection" under the 1996 Act – remarkably similar to the allegations asserted by the *Trinko* plaintiff and by CLECs in other lawsuits against RBOCs – sufficiently "allege[d] exclusionary conduct by a firm with monopoly power that lacks business justification and that harms competition." *See* Brief for the United States and Federal Communications Commission as Amici Curiae in Support of Appellants, *Intermedia Communications, Inc. v. BellSouth Telecommunications, Inc.*, No. 01-10224-JJ (11th Cir. filed Mar. 28, 2001) at 25-26. Indeed, in its brief, the government described "exclusionary conduct" as: "conduct that 'not only (1) tends to impair the opportunities of rivals, but also (2) *either* does not further competition on the merits *or* does so in an unnecessarily restrictive way. . . . If 'valid business reasons' do not justify conduct that tends to impair the opportunities of a monopolist's rivals, that conduct is exclusionary." *Id.*, at 21 (*quoting Aspen*, 472 U.S. at 605, n. 32) (emphasis added).

In that same brief, the DOJ and the FCC also resoundingly rejected any interpretation of the 1996 Act that would provide BellSouth with antitrust immunity based on the existence of the 1996 Act. There, the DOJ and FCC stated:

> The United States and the FCC believe that it is essential that developing case law reflect an appropriate reconciliation of the [1996 Act] and the Sherman Act, affording the public the benefits of all the tools Congress has chosen to foster competition in this critical sector of the economy. The district court in this case [Intermedia] correctly stated the law: conduct that would have violated the Sherman Act before the enactment of the TCA still violates it today, whether or not it also violates the TCA. In doing so, the district court implicitly rejected BellSouth's argument that enactment of the TCA implicitly repealed Section 2 of the Sherman Act with respect to anticompetitive conduct involving competitor's access to local telecommunications networks.

*Id.*, at 7-8.

In another *amicus curiae* brief submitted to the Eleventh Circuit in *Covad Communications Company v. BellSouth Telecomms., Inc.*, No. 01-16064-C (11th Cir., filed Dec. 17, 2001), a case in which BellSouth unsuccessfully raised arguments similar to those Verizon raises in *Trinko*, the DOJ and the FCC expressly rejected BellSouth's argument that "an incumbent monopoly provider of local telecommunications services cannot, as a matter of law, violate the antitrust laws by refusing to provide rivals access to its network on reasonable terms." *Id.*, at 11. Again, the government expressly recognized that violations of Section 251 of the 1996 Act may constitute antitrust violations. "Disputes over the terms on which a potential rival may obtain access to an incumbent local exchange carrier's network, whether or not they involve violations of the 1996 Act, will normally provide no basis for a finding of antitrust liability, *provided the incumbent's conduct makes no significant contribution to maintenance of its monopoly*. But if an incumbent engages in exclusionary conduct that effectively prevents the emergence of substantial competition, *a dispute over terms of access may be part of a claim under Section 2*." *Id.*, at 26 (emphasis added).

These declarations are not ancient. The government offered its views in *Intermedia* in May 2001 and in *Covad* in December 2001. Yet in 2003, in *Trinko*, the government repudiated those views, and opined that violations of the access duties imposed by the 1996 could never, as a matter of law, give rise to antitrust liability. Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner, *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, No. 02-682 (Supreme Court, filed May 2003) at 16. Notably, the FCC did not join in the *Trinko* brief. Congress has not amended the antitrust laws since the United States and the FCC first opined on these issues. The change in the government's position is not justified.

### C. Inconsistency with Pre-1996 Telecom Antitrust Enforcement

Perhaps most troubling about the government's change in position is that it so thoroughly rejects the history of antitrust enforcement in this very industry. Long before the 1996 Act, the Unites States brought an antitrust enforcement action against AT&T, then the local telephone monopolist, for failure to provide interconnection on reasonable terms. AT&T moved to dismiss at the close of the government's case-in-chief. In its brief in opposition to the motion, the government established that AT&T's conduct, much like the RBOC conduct at issue in *Trinko* and other CLEC-initiated antitrust litigation, fell well within the purview of the antitrust laws as interpreted and enforced by the government. *See* Plaintiff's Memorandum in Opposition to Defendant's Motion for Involuntary Dismissal Under Rule 41(b), *United States v. AT&T Co.*, No. 74-1698 (D.D.C., filed Aug. 16, 1981).

The government emphasized the exclusionary effects of raising-rivals'-costs schemes similar to those employed by Verizon and other ILECs:

> Even with respect to those limited facilities AT&T agreed to provide, it imposed a number of cumbersome and unnecessary technical and operational practices on its competitors which increased their costs and lowered the quality of their service, in marked contrast to the efficient interconnection arrangements made available to AT&T's own intercity private line connections. *Id.*, at 79.
>
> Broadly, the major features of AT&T's exclusionary conduct in the intercity services market have been the manipulation of the terms and conditions under which competitors are permitted to interconnect with AT&T's existing services and facilities, including those of the local exchange operators . . . *Id.*, at 67.

The approach suggested by the RBOCs and the government in *Trinko*, however, which would require the equivalent of predatory pricing to state a refusal to deal claim, would place all that plainly anticompetitive conduct beyond the reach of the antitrust laws. The government did not suggest the Court impose such a requirement on its claims against AT&T:

> While there may be instances in which a refusal to interconnect has no antitrust ramifications, that is simply not the case where a monopoly carrier seeks to use its market position to exclude a competitor. *Id.*, at 65.

> Although a company may normally choose to deal with whomever it wishes, a monopolist violates Section 2 of the Sherman Act if it refuses to deal with a competitor with the purpose of maintaining or extending its monopoly. [cites] Such conduct is unlawful because a refusal to supply or buy may be used to extend monopoly power into adjacent markets, and an integrated firm with monopoly power in one market can gain a competitive advantage in others by refusing entirely to deal with its rivals or by imposing arbitrary and discriminatory terms on them. Courts have consistently condemned such behavior. *Id.*, at 80-81.

Again, the antitrust laws have not changed in the interim. The antitrust laws did, indeed, impose precisely the kinds of sharing obligations mandated by the 1996 Act, long before that act came to pass. As a result, the attempt by the ILECs and the DOJ to rewrite history is simply an end-run around the unambiguous savings clauses in the 1996 Act.

## III. Conclusion

Mr. Chairman and members of the committee, regulations can promote competition and protect consumers. But in all markets, the antitrust laws are a crucial backstop. This is especially true in the area of wireline telecommunications, where the market is dealing with the very substantial vestiges of a government-sponsored monopoly. It is even more true in the local telecommunications market, where increasing deregulation of the monopoly leaves little between monopoly market power and the consumer.

I should emphasize that the main benefit of anti-trust laws isn't the fact that anti-competitive actions are the subject of civil or criminal sanction; it is the fact that many thousands of anti-competitive actions are averted, as potential market predators are dissuaded by the prospect of such sanctions. The limited sanctioning ability of regulatory agencies – mainly relatively minor fines – lack the deterrent effect of the tools provided by anti-trust laws.

I believe there are two things that this Committee and this Congress should pursue to ensure the promotion of competition and the protection of consumers. The first can begin today. Congress should make clear to the Department of Justice that regulatory enforcement and anti-trust enforcement are not an either-or choice; rather they compliment each other. Congress should further encourage DOJ to intervene wherever possible to make this clear to the courts, and to actively monitor and participate in rulemakings at the FCC to ensure that competition is not undermined.

The second measure is more difficult, but probably more important. Congress should clarify once and for all in statute that the savings clause in the 1996 Act means exactly what it says. It has been humorously suggested that the courts might get the message if the section were amended by underlining it and adding two exclamation points. But whatever form that clarification takes, it should make clear that telecommunications consumers deserve the protection of both regulatory and anti-trust enforcement. Additionally, we further support Chairman Sensenbrenner's suggestion that, should the Supreme Court reach the merits in *Trinko* and adhere to the Bell company position, this Committee should work rapidly to remedy that result.

Competition is at a crucial stage in the local market. Consumers are beginning to truly taste the benefits of a more free market. But the FCC has granted vast deregulation to the Bell companies, to the point where only the antitrust laws can ensure that competition continues to flourish. Do not let the monopolies convince you that somehow those laws do not or should not apply.